(1) Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

BEN MAGGARD, Deceased; and AUDREY MAGGARD, Widow and Next Friend of ANDREW MAGGARD, A Minor, Petitioners,

v.

LESLIE RESOURCES, INC., et al., Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Rule 76.40 of the Kentucky Rules of Civil Procedure, which provides that documents filed on appeal, including the notice of appeal, are timely filed if mailed registered mail, but not timely filed if mailed certified mail, violate the Equal Protection Clause or the Substantive Due Process Clause of the United States Constitution?

2. Does the application of Rule 76.40(2) of the Kentucky Rules of Civil Procedure, which does not permit filing of a notice of appeal mailed by certified mail rather than registered mail, as the result of excusable neglect of counsel, violate the Equal Protection Clause or the Substantive Due Process Clause of the United States Constitution?

LIST OF PARTIES

The parties to the proceedings below were the petitioners Ben Maggard, Deceased; and Audrey Maggard, Widow and Next Friend of Andrew Maggard, A Minor, and the respondents Leslie Resources, Inc.; the Special Fund; Honorable Thomas A. Nanney, Administrative Law Judge; and the Workers' Compensation Board.

The respondents before this Court include Leslie Resources, Inc.; the Special Fund; the Honorable Thomas A. Nanney, Administrative Law Judge; and the Workers' Compensation Board.

The Attorney General of the Commonwealth of Kentucky has been served with the Petition for Writ of Certiorari, as 28 U.S.C. §2403(b) may be applicable.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

BEN MAGGARD, Deceased; and AUDREY MAGGARD, Widow and Next Friend of ANDREW MAGGARD, A Minor, Petitioners,

v.

LESLIE RESOURCES, INC., et al., Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

The petitioners, Ben Maggard, Deceased; and Audrey Maggard, Widow and Next Friend of Andrew Maggard, A Minor, respectfully pray the Supreme Court to grant a Writ of Certiorari to review the judgment and opinion of the Supreme Court of Kentucky entered in the above-entitled proceeding on August 17, 1995.

OPINIONS BELOW

The orders of the Supreme Court of Kentucky have not been reported. They are reprinted in the appendix hereto, pages 1a; 21a; 22a.

The order of the Court of Appeals of Kentucky has not been reported. It is reprinted in the appendix hereto, page 2a.

The opinion of the Workers' Compensation Board of Kentucky has not been reported. It is reprinted in the appendix hereto, page 5a.

The opinion of the Honorable Thomas A. Nanney, Administrative Law Judge, has not been reported. It is reprinted in the appendix hereto, page 14a.

JURISDICTION

On February 17, 1995, the Kentucky Court of Appeals issued its decision affirming the dismissal of the petitioners' workers' compensation claim. Petitioners attempted to file their notice of appeal to the Kentucky Supreme Court, but on March 21, 1995, the Office of the Clerk of the Court of Appeals refused to file the notice of appeal, pursuant to Rule 76.40(2) of the Kentucky Rules of Civil Procedure, as the notice of appeal was mailed by certified mail rather than by registered mail.

Petitioners moved for an enlargement of time in which to file a notice of appeal, and the Supreme Court of Kentucky denied that motion on June 1, 1995. Petitioners moved to

reconsider the June 1, 1995 order, and the Supreme Court of Kentucky denied that motion on August 17, 1995. Petitioners moved for leave to file a motion for rehearing, and the Supreme Court of Kentucky denied that motion on October 18, 1995.

The jurisdiction of this Court to review the order of the Supreme Court of Kentucky is invoked under 28 U.S.C. §1257(3).

STATUTE INVOLVED

Rule 76.40 of the Kentucky Rules of Civil Procedure

(2) Timely Filing.* To be timely filed, a document must be received by the Clerk of the Supreme Court or the Clerk of the Court of Appeals within the time specified for filing, except that any document shall be deemed timely filed if it has been transmitted by United States registered (not certified) or express mail, or by other recognized mail carriers, with the date the transmitting agency received said document from the sender noted by the transmitting agency on the outside of the container used for transmitting, within the time allowed for filing.

*Suggested title added by Publisher.

STATEMENT OF THE CASE

In 1991, petitioner Audrey Maggard, Widow of Ben Maggard, Deceased, and Mother of Andrew Maggard, a Minor, filed a workers' compensation claim, alleging that her husband suffered a work-related injury on either May 28 or May 29, 1991, which resulted in his death. Mr. Maggard had been employed by respondent Leslie Resources, Inc. as a bulldozer operator. Mr. Maggard's last day of work was June 10, 1991, and he died on June 23, 1991. The autopsy listed the cause of death as "brain stem and cerebral infarction, secondary to recent vertebral basilar arterial occlusion."

In an opinion issued July 9, 1992, Honorable Thomas A. Nanney, Administrative Law Judge, dismissed the claim, after determining that the cause of death as determined by the autopsy was not attributable to any work-related event. (Appendix, p. 14a.) That decision was appealed to the Workers' Compensation Board of the Commonwealth of Kentucky.

On March 26, 1993, the Workers' Compensation Board affirmed Judge Nanney's dismissal of the claim. (Appendix, p. 5a.) The petitioners appealed to the Kentucky Court of Appeals.

On February 17, 1995, Kentucky's Court of Appeals affirmed the dismissal of the claim. (Appendix, p. 2a.)

Pursuant to the applicable Workers' Compensation Statute found at KRS 342.290, the petitioners had one more appeal as of right, that being to the Kentucky Supreme Court. Pursuant to the applicable civil rule, Rule 73.02 of the

Kentucky Rules of Civil Procedure, the petitioners were required to file their notice of appeal with the Clerk of the Court of Appeals within thirty (30) days, by March 19, 1995. Pursuant to the applicable civil rule, Rule 6.01 of the Kentucky Rules of Civil Procedure, as March 19 was on a Sunday, the petitioners were required to file their notice of appeal on or before March 20, 1995.

On March 16, 1995, the undersigned's office mistakenly mailed the notice of appeal to the United States Court of Appeals for the Sixth Circuit, rather than the Kentucky Court of Appeals. (Appendix, p. 27a.)

On March 18, 1995, the undersigned received notification from the United States Court of Appeals for the Sixth Circuit that the notice of appeal had apparently been mailed to them in error. (Appendix, p. 26a.) On March 18, 1995, a Saturday, the undersigned mailed the notice of appeal to the Kentucky Court of Appeals, by certified mail. (Appendix, p. 25a.)

On March 21, 1995, the Office of the Clerk of Kentucky's Court of Appeals received the notice of appeal, and refused to accept it, as the notice of appeal was mailed by certified mail rather than by registered mail, as required by Rule 76.40(2) of the Kentucky Rules of Civil Procedure. (Appendix, p. 23a.)

On March 23, 1995, petitioners filed with the Court of Appeals a motion for an extension of time in which to file notice of appeal and/or motion to accept notice of appeal. (Appendix, p. 33a.) The Supreme Court of Kentucky treated this motion as a belated motion for an enlargement of time in

which to file a notice of appeal, and denied the motion by order of June 1, 1995. (Appendix, p. 22a.)

HOW THE FEDERAL QUESTION WAS PRESENTED

Petitioners assert that the federal question of whether 76.40(2) violates the Equal Protection Clause or Substantive Due Process Clause of the Fourteenth Amendment, did not arise until the order of the Supreme Court of June 1, 1995. Thereafter, on June 7, 1995, petitioners filed a motion for reconsideration of the June 1, 1995 order. (Appendix, p. 29a.) Petitioners implicity raised the federal question in the following sentence in that motion to reconsider:

> Since this document was transmitted by United States certified mail, the notice of appeal should be considered timely filed under the doctrine of substantial compliance and the appeal should be permitted to go forward so that this case may be decided on the merits and so that Audrey Maggard is not denied her constitutional right to appeal. (Appendix, p. 31a.)

On September 6, 1995, petitioners tendered a petition for rehearing and/or modification. By order of October 18, 1995, Kentucky's Supreme Court denied petitioners' motion

for leave to file the petition for rehearing and/or modification. (Appendix, p. 21a.)

Petitioners assert alternatively that the instant situation is one of the rare situations in which the highest state court, following a decision wherein the federal issue is born, declines to entertain a petition for rehearing, and the federal question can be raised in no other way than through the papers addressed to the Supreme Court. Saunders v. Shaw, 244 U.S. 317, 320 (1917).

REASONS FOR GRANTING THE WRIT

I

Rule 76.40(2) of the Kentucky Rules of Civil Procedure violates the Equal Protection Clause and the Substantive Due Process Clause of the United States Constitution, and its application conflicts with decisions of this Court.

Rule 76.40(2) of the Kentucky Rules of Civil Procedure ("CR 76.40(2)") violates both the Equal Protection and the Substantive Due Process Clauses of the United States Constitution. CR 76.40(2) provides as follows:

> (2) **Timely Filing.*** To be timely filed, a document must be received by the Clerk of the Supreme Court or the Clerk of the Court of

> Appeals within the time specified for filing, except that any document shall be deemed timely filed if it has been transmitted by United States registered (not certified) or express mail, or by other recognized mail carriers, with the date the transmitting agency received said document from the sender noted by the transmitting agency on the outside of the container used for transmitting, within the time allowed for filing.
>
> *Suggested title added by Publisher.

The distinction drawn by this Civil Rule between documents mailed by registered mail and documents mailed by certified mail is unreasonable and arbitrary. This Civil Rule applies to the filing of all documents on appeal, in the case of the petitioners, held applicable to the notice of appeal. In the petitioners' case, had the notice of appeal been mailed registered mail, it would have been filed. However, because the notice of appeal was mailed certified mail, pursuant to CR 76.40(2) the Office of the Clerk refused to file the notice of appeal. In fact, in returning the notice of appeal, unfiled, the Office of the Clerk noted that it was not timely, as it was mailed certified mail rather than registered mail.

Such a classification is unreasonable and arbitrary. Such a classification does not rest upon a ground of difference having a fair and substantial relation to the object of the rule. Such a classification ensures that persons similarly circumstanced are not similarly treated. Such a classification

is purely arbitrary, and thus violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. F. S. Royster Guano Company v. Virginia, 253 U.S. 412 (1920); Lindsley v. Natural Carbonic Gas Company, 220 U.S. 61 (1911). As CR 76.40(2) is arbitrary and irrational in the manner in which it classifies those who have filed a notice of appeal, the rule violates the Substantive Due Process Clause of the Fourteenth Amendment of the United States Constitution. Duke Power v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978).

This Court has recently held, on facts similar to the facts in the petitioners' case, that the statute in question was simply not a rational way of achieving the objective sought to be achieved. In Logan v. Zimmerman Brush Company, 455 U.S. 442 (1982), this Court considered a statute which required that a commission convene a fact finding conference within 120 days, or lose jurisdiction over the complaint which had been filed. In the Logan case, the fact finding conference had been scheduled five days late. This Court reviewed the statute in question pursuant to the Equal Protection Clause, and found that the statute was simply not a rational way of achieving the objective sought to be achieved, holding that the statute was "the very essence of arbitrary state action."

The analysis in Logan is directly applicable to the case at hand. In the petitioners' case, the petitioners' notice of appeal was deemed to be not timely filed, for the reason that it was mailed certified mail rather than registered mail. The objective of achieving a timely filing of documents on appeal is simply not furthered by the requirement that, in order to be

timely filed, documents, including a notice of appeal, must be mailed registered, rather than certified mail. Such a requirement is the very essence of arbitrary state action, and violates the guarantees of equal protection and substantive due process as found in the Constitution.

II

Application of Rule 76.40(2) of the Kentucky Rules of Civil Procedure raises important and unresolved problems.

The application of Rule 76.40(2) of the Kentucky Rules of Civil Procedure ("CR 76.40(2)") raises important and unresolved problems concerning the timely filing of documents on appeal, including the notice of appeal. In the petitioners' case, petitioners are given an appeal as of right to the Kentucky Supreme Court by the applicable Workers' Compensation Statute. However, CR 76.40(2) effectively denied the petitioners, and others similarly situated, their right of appeal. It is the undersigned's information that several documents per month are returned by the Office of the Clerk of Kentucky's Court of Appeals pursuant to CR 76.40(2). The application of this rule raises an important and unresolved problem, i.e. whether a rule which, as petitioners contend, wrongfully distinguishes between appellants who are similarly situated, should be strictly enforced.

The strict enforcement of CR 76.40(2) is a violation of the petitioners' substantive due process rights. The Commonwealth of Kentucky has recently adopted a policy of substantial compliance with respect to a majority of documents submitted on appeal. Ready v. Jamison, 705 S.W.2d 479 (Ky. 1986). Additionally, the practice in federal courts has been to accept late appeals where there is excusable neglect. Pioneer Investment Services Company v. Brunswick Associates, ___ U.S. ___, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) (in the context of Bankruptcy Rule 9006(b) which provides for late filing when failure to act was due to excusable neglect). Thus the strict enforcement of CR 76.40(2) conflicts with decisions of this Court, and raises important and unresolved problems for those similarly situated.

In the petitioners' case, the enforcement of CR 76.40(2) denied the petitioners their right to appeal. Petitioners assert that CR 76.40(2) arbitrarily denied them, and denies to those similarly situated, even in the face of excusable neglect of counsel, access to legal redress as given to them by law and by the United States Constitution.

CONCLUSION

As Rule 76.40(2) of the Kentucky Rules of Civil Procedure violates the Equal Protection and Substantive Due Process Clauses of the United States Constitution, and as its application conflicts with decisions of this Court, and as its

application raises important and unresolved problems, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Supreme Court of Kentucky

95-SC-289-WC

BEN MAGGARD, Deceased; ET AL. APPELLANTS

V. APPEAL FROM COURT OF APPEALS
NO. 93-CA-966-WC
(Workers' Compensation Board No. 91-42303)

LESLIE RESOURCES, INC.; ET AL. APPELLEES

ORDER

Appellant's motion for reconsideration of the June 1, 1995, order denying motion for enlargement of time in which to file a notice of appeal is denied.

Stephens, C.J., Stumbo, Wintersheimer, and Reynolds, JJ., sitting. All concur.

ENTERED: August 17, 1995

/s/ Robert F. Stephens
Chief Justice

RENDERED: FEBRUARY 17, 1995; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals
93-CA-0966-WC

BEN MAGGARD, Deceased, and AUDREY MAGGARD, Widow and Next Friend of Andrew Maggard, A Minor — APPELLANTS

PETITION FOR REVIEW UNDER CR 76.25
Of A Decision Of The Workers' Compensation Board
WC-91-42303

LESLIE RESOURCES, INC.;
SPECIAL FUND;
HONORABLE THOMAS A. NANNEY,
Administrative Law Judge;
and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

* *

BEFORE: HOWERTON, JOHNSTONE, and WILHOIT, Judges.

HOWERTON, JUDGE. Audrey Maggard and Andrew Maggard, a minor, respectively the widow and son of Ben Maggard, deceased, petition for review from a Workers' Compensation Board opinion affirming the dismissal of their claim by the Administrative Law Judge (ALJ). The ALJ determined that the Maggards had failed to prove that Ben Maggard's death was the result of a work-related injury. The Maggards contend (1) that the lay and medical evidence was strong enough to compel a finding in favor of them, (2) that the ALJ failed to grant them the statutory presumption of liability provided by KRS 342.680, (3) that the ALJ and Board erred by failing to find that the employer had been given timely notice of the alleged work-related injury, (4) that the ALJ erred by finding that there were inconsistencies in the description of the alleged work-related injury, and (5) that the ALJ erred by finding that the medical evidence did not establish a work-related incident resulting in Ben Maggard's death.

With the exception of the alleged error concerning due and timely notice, all allegations of error pertained to whether the evidence compels a finding in favor of the Maggards. Our standard of review in this situation is to consider whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in the Maggards' favor. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). We have reviewed the briefs and the record, and can only conclude that a favorable finding is not compelled. We agree with the opinion of the Workers' Compensation Board, and for all of the reasons contained in that opinion written by Chairman Angelucci and rendered March 26, 1993, we affirm.

ALL CONCUR.

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Commonwealth of Kentucky
Workers' Compensation Board

OPINION RENDERED: March 26, 1993

CLAIM NO. 91-42303

BEN MAGGARD, DECEASED; AUDREY MAGGARD, WIDOW AND NEXT FRIEND OF ANDREW MAGGARD, A MINOR — PETITIONERS

VS. APPEAL FROM HON. THOMAS A. NANNEY, ADMINISTRATIVE LAW JUDGE

HON. THOMAS A. NANNEY, ADMINISTRATIVE LAW JUDGE; LESLIE RESOURCES; AND SPECIAL FUND — RESPONDENTS

AFFIRMING

* * * * * * * * * * * * *

BEFORE: ANGELUCCI, Chairman, GREATHOUSE, and TURNER, Board Members

ANGELUCCI, CHAIRMAN. Audrey Maggard, widow of the deceased worker Ben Maggard ("Maggard"), appeals from an Opinion rendered July 9, 1992 by Administrative Law Judge Thomas A. Nanney ("ALJ"), which dismissed her claim. The ALJ concluded that the plaintiff below had failed in her burden of proving that Maggard's stroke was caused by a work-related injury. On appeal, Mrs. Maggard contends that the evidence compels a

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finding in her favor.

Maggard was born on September 15, 1935, and was 55 years old at the time of his death. His past work included that of mechanic, teacher, post office clerk, construction foreman, and bulldozer operator. He began working for Leslie Resources ("Leslie") in August 1989 as a bulldozer operator and continued to work there until June 10, 1991.

This appeal revolves around the issue of whether Maggard suffered a work-related injury sufficient to trigger his fatal stroke. Mrs. Maggard deposed that on June 3, 1991, her husband began complaining of headaches, visual disturbances, slurred speech, dizziness, and an unsteady gait. After Maggard was hospitalized, Mrs. Maggard spoke with his foreman, James Caudill, who informed her that Maggard had suffered a hard jolt at work sometime earlier. After Maggard died on June 23, 1991, Mrs. Maggard attempted to place her husband's symptoms and work-related injury in chronological order. She determined that the jolt must have occurred on May 28 or 29, 1991, that her husband's complaints began on June 2, 1991, that his last day of work was June 10, 1991, that he was first hospitalized on June 13, 1991, that he was moved to the University of Kentucky Hospital on June 18, 1991, and that he eventually died on June 23, 1991.

James Caudill, Maggard's foreman, testified that Maggard complained of blind spells and dizziness on his last day of work, and mentioned that he had taken "a good lick the other day." He did not remember telling Mrs. Maggard about the jolt, contrary to her testimony. He stated that Maggard never reported any accident

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and explained that the bulldozer on which Maggard worked was the biggest one they had, replete with shock absorbers and a padded seat.

Maggard's co-workers, Gary Cornett, Edgar Baker, and Kelly Darrell Whitaker, were each deposed and confirmed that on Maggard's last day of work he complained of headaches and dizziness and told them that he had suffered a hard lick while operating the dozer at sometime, but none of them was able to even estimate when that jolt took place.

Dr. Irma DeLeon attended Maggard during his hospitalization of June 13, 1991 through June 17, 1991. She testified that her first knowledge of any work-related injury was a note placed in Maggard's chart by his daughter, who also happens to be a nurse at the admitting hospital. When she asked Maggard about this, he described being jarred in the bulldozer two weeks earlier. Dr. DeLeon opined that the jarring he experienced may have contributed to the blood clot, but added that other possible causes were his atherosclerosis, smoking history, hypercholesterolemia, and hyperglycemia. Finally, she testified that a stroke can occur absent trauma.

Dr. Andrew Massey is a neurologist who attended Maggard at the U.K. Hospital. Maggard's family gave Dr. Massey a history of enduring several extreme jolts on the bulldozer three weeks prior to his admission. Dr. Massey explained that Maggard's stroke involved the cerebellum and the brain stem and that the wall of the vertebral artery had been damaged. He opined that there seemed to be a reliable temporal relationship between the work jolt and the

OPINION RENDERED: March 26, 1993

onset of his symptoms. He felt it likely that the stroke was caused by the injury, and he did not think that Maggard would have suffered the stroke at that time but for the injury. However, he also admitted that absent a neck injury, the stroke could have occurred spontaneously. He admitted that his final opinion depends upon the accurate description of the injury and the temporal relationship between the injury to the stroke.

Dr. Daron G. Davis, a neuropathologist, completed the autopsy on Maggard on June 24, 1991. Dr. Davis listed the cause of death as brain stem and cerebellar infarction, secondary to recent vertebro-basillar occlusion. His other final anatomic diagnoses included bilateral vertebral arterial mural injury with subsequent thrombosis and extension of thrombus into basilar artery, severe atherosclerotic vascular disease of vertebral and basilar arteries, extensive infarction of the cerebellum and brain stem, and moderate coronary atherosclerosis. Dr. Davis assumed that Maggard had suffered a hard lick at work due to an abrupt change in level one week before his symptoms began, and thus concluded that the injury could have caused the bilateral vertebral artery injury. Dr. Davis explained that Maggard had suffered a rare hemorrhage in the wall of the right vertebral artery which had resulted in a brain stem stroke. He opined that a minor traume of hyperflexion or extension or rapid rotation can damage the vertebral artery. He also explained that atherosclerosis and plaque build up make arteries brittle and consequently more vulnerable to trauma. In his opinion, absent the injury to the artery wall, the thrombosis would not have occurred.

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Dr. Joseph L. Zerga, a neurologist, reviewed the medical evidence on February 5, 1992, and assumed that Maggard had suffered a jolt while driving a bulldozer one week prior to the onset of his symptoms. Thus, he diagnosed progressive vertebral basilar thrombotic process which more than likely started approximately May 30, 1991. He felt that if there were substantiation of trauma which imparted force on the neck (whether blunt or acceleration or deceleration), then there was a sufficient temporal relationship to suggest that trauma played a role in his death.

In his opinion, the ALJ recognized that this case presented a very close question on the issue of causation, but found that Mrs. Maggard had failed to sustain her burden of proof:

> The plaintiff never actually described the alleged "hard jar", nor was there any testimony as to the precise time that this incident allegedly occurred. Plaintiff was never able to state whether this incident occurred prior to or after the onset of his symptoms. It is further interesting to note that the first documentation that the plaintiff sustained a work-related injury was a notation placed in the plaintiff's medical chart by his own daughter. The medical testimony establishes only that the alleged work-related incident "could have" or "may have" resulted in plaintiff's death, but to a large degree, this conclusion must be based upon the history of the work-related event which was provided by Mr.

OPINION RENDERED: March 26, 1993

> Massey's [sic] family. As pointed out by the Defendant-Employer, there appeared to be some inconsistencies in the description of the alleged work-related event as provided by the family. Dr. Massey received a history of "several extreme jolts" whereas, Dr. DeLeon received a history of a jarring incident whereby plaintiff's bull dozer changed levels. It must also be noted that the plaintiff had several other significant risk factors which could also have resulted in the onset of symptoms and his ultimate death. Under the facts as presented in this case, this Administrative Law Judge concludes that these other risk factors are equally credible causes for the onset of plaintiff's complaints. Both Dr. Massey and Dr. Davis clearly stated that plaintiff's could have occurred in the absence of a traumatic event. The totality of the evidence in this case is simply insufficient to persuade this Administrative Law Judge that the plaintiff suffered a work-related injury which resulted in the stroke and his ultimate death.

The petitioner makes several arguments on appeal, but they ultimately boil down to her contention that the evidence compels a finding in her favor. It is well established that as the plaintiff, Mrs. Maggard had the burden of proving that her husband's death was caused by a work-related injury. Snawder v. Stice, Ky.App., 576

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S.W.2d 276 (1979). Since she was unsuccessful, the question on apeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in her favor. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Compelling evidence has been defined as evidence which is so overwhelming that no reasonable person could reach the same conclusion as the fact-finder. REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224 (1985). It is not enough to show that there is some evidence which would support a reversal, and if the decision of the ALJ is supported by any evidence of substance it cannot be reversed on appeal. McCloud v. Beth-Elkhorn Corporation, Ky., 514 S.W.2d 46 (1974); Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

The medical evidence, considered as a whole, would support a finding that the alleged jolting trauma Maggard sustained at work at the end of May 1991 contributed to his stroke. However, that finding in turn would be based on acceptance of the fact that such a jolt occurred at the time alleged by the claimant.

Apparently, Maggard informed Dr. DeLeon that he had been jarred two weeks prior to his admission. She did not testify that he indicated the severity or even how this jarring took place. According to Maggard's foreman, James Caudill, no report was ever filed about such an injury. Maggard's co-workers recalled his complaining about a hard lick he had sustained, but were clueless as to when this occurred. As time passed, the description of the event metamorphosed from a jarring or a hard lick into "several extreme jolts." As the ALJ has the sole authority to judge the

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weight, credibility, substance, and inferences to be drawn from the evidence, Paramount Foods, Inc. v. Burkhardt, supra, we cannot disturb his finding that the claimant failed to carry her burden of proving a work-related injury.

Also supporting the ALJ's decision is the fact that Maggard suffered from other conditions, namely, atherosclerosis, smoking, hypercholesterolemia, and hyperglycemia, which put him at risk for suffering a stroke. Moreover, Drs. Massey and DeLeon testified that even absent a neck injury, Maggard's stroke could have spontaneously occurred. Thus, despite the fact that the evidence created an extremely close question, because the ALJ's determination is supported by substantial evidence, it cannot be reversed.

Inasmuch as we have affirmed the ALJ's finding that the plaintiff failed to sustain her burden of proving a work-related injury, her argument that she is entitled to the presumption found at KRS 342.680 also fails since it requires unrebutted prima facie evidence of a work-related injury.

Accordingly, the Opinion rendered July 9, 1992 by the Honorable Thomas A. Nanney, Administrative Law Judge, is AFFIRMED, and the appeal by Audrey Maggard is hereby DISMISSED.

ALL CONCUR.

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COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS
CLAIM NO. 91-42303

BEN MAGGARD, DECEASED — PLAINTIFF
AUDREY MAGGARD, WIDOW AND
NEXT FRIEND OF ANDREW MAGGARD,
A MINOR

VS.

LESLIE RESOURCES
AND SPECIAL FUND — DEFENDANT

HON. PHYLLIS L. ROBINSON
P.O. BOX 952
HYDEN, KY 41749
ATTORNEY FOR PLAINTIFF

HON. RANDALL SCOTT MAY
P.O. BOX 1017
HAZARD, KY 41701
ATTORNEY FOR DEFENDANT

HON. WILLIAM C. EVANS
SPECIAL FUND

OPINION OF HON. THOMAS A. NANNEY
ADMINISTRATIVE LAW JUDGE

FINDINGS OF FACT

1. This is a claim brought by Audrey Maggard, the widow of Ben Maggard, for an alleged work-related injury that was sustained on either May 28 or May 29, 1991 which allegedly resulted in the death of Ben Maggard. Mr. Maggard was employed by the Defendant-Employer as a bulldozer operator. His last day of work was June 10, 1991 and he died on June 23, 1991. The autopsy listed the cause of death as "brain stem and cerebral infarction, secondary to recent vertebral basilar arterial occlusion." The issue presented in this case is whether the cause of death as determined by the autopsy is attributable to any work-related event.

2. The plaintiff was 55 years of age at the time of his death, born September 15, 1935. At the time of his death, he was married to the plaintiff, Audrey Maggard and they had one dependent child, Andrew Taylor Maggard, born September 4, 1981.

Mr. Maggard had worked in the past as a mechanic, a teacher, a post office clerk, a construction foreman and a bulldozer operator. He had been a bulldozer operator since 1974. He began working for the Defendant-Employer in August, 1989 and last worked on June 10, 1991.

3. The determination of whether any work-related incident or even resulted in plaintiff's death must be determined based upon the testimony of the lay witnesses who last had contact with the plaintiff, as well as the medical testimony obtained subsequent to plaintiff's death.

At the time of his death, Mr. Maggard's supervisor was James Caudill. He also worked with Kelly Darrell Whitaker, Gary Cornett and Edgar Baker.

James Caudill, plaintiff's immediate supervisor, stated that on the last night he worked with the plaintiff, plaintiff complained of blind spells, dizziness, blackouts and a headache.

Although plaintiff apparently never specifically told Mr. Caudill that he considered these conditions work-related, he did state to Mr. Caudill that he "had a jolt", but Mr. Caudill stated that he was not aware of when this incident was to have occurred. Mr. Caudill was of the opinion that the "jolt" had occurred several months prior to plaintiff's last day of work.

Testimony was also received from Kelly Darrell Whitaker, Gary Cornett and Edgar Baker. These individuals recall that plaintiff, at some point prior to his last day of work, made a statement that he had taken a "hard lick" or a "hard jolt". However, none of these men were able to pinpoint a time when this incident occurred in relation to Mr. Maggard's symptoms and complaints of dizziness, black out spells, headaches and blurred vision. None of these individuals had any knowledge of the specifics of the alleged incident or the nature of the injury which might have been sustained.

4. Mrs. Audrey Maggard testified that following her husband's death, she attempted to sit down with the calendar and recall the sequence of events leading to her husband's death. It was her belief that her husband began feeling bad on or about June 3, 1991 and that he had trouble with his vision and slurred speech. She noted that he last worked on June 10, 1991 and first received treatment at the Redbird Clinic on June 13, 1991. Mrs. Maggard testified that he husband mentioned at some point while he was hospitalized that he had taken a hard jolt at work.

5. Dr. Irma DeLeon of the Redbird Mission in Clay County, Kentucky, testified that she first saw Ben Maggard on June 13, 1991. At that time, she received a history from Mr. Maggard of feeling dizzy in the head for approximately two weeks and also complaining of having episodes of double vision. He stated that he had been off balance when he walked and that this had been going on for approximately two days. He had also had a headache for two

or three days. Dr. DeLeon performed a physical examination which was essentially normal, but she admitted Mr. Maggard to the Manchester Memorial Hospital. Dr. DeLeon testified that while Mr. Maggard was in the hospital, his daughter, who is a nurse at the hospital, left a note in her father's chart, indicating that he had been injured at work. Dr. DeLeon stated that she questioned Mr. Maggard about the incident but at the time she spoke with his, he was unable to recall anything specific about the incident. Nonetheless, she noted it on his chart. According to her notes, it could not be determined whether Mr. Maggard suffered a direct trauma to his head or neck and it was unclear whether the alleged jar occurred prior to or after the onset of his complaints. She stated that the note described the incident as occurring while Mr. Maggard was operating a bull dozer and that he hit a lower area which jarred him. When questioned specifically about the causal connection between the alleged jarring incident and the plaintiff's death, Dr. DeLeon stated that she could not state that the jarring incident caused the plaintiff's condition, but only that it may have contributed to it. Dr. DeLeon noted that the plaintiff also had pre-existing atherosclerosis disease of the blood vessels and he was a smoker. He also had mild hypercholesterolemia and mild hyperglycemia which were also factors which must be considered in determining the cause of a stroke.

6. Testimony was also received from Dr. Andrew Massey, a neurologist, who first examined plaintiff upon his arrival at the University of Kentucky Medical Center. Dr. Massey stated that he received a history from the family that plaintiff had been working on a bull dozer and had "taken several extreme jolts" and that thereafter, he began complaining of neck pain and headaches. Dr. Massey stated that upon examination of Mr. Maggard, it appeared that he had suffered a stroke and that the stroke involved the brain stem, the cerebellum and possibly, the temporal lobes,

including the occipital lobes. Mr. Maggard did not respond to treatment was eventually placed on life support systems. The life support systems were subsequently removed and Mr. Maggard died on June 23, 1991. Dr. Massey indicated that the final anatomical diagnosis and the pathology report revealed that Mr. Maggard suffered from extensive atherosclerotic vascular disease which consisted of cholesterol and calcium plaque in his arteries. He also noted that there was evidence of a hemorrhage in the walls of the artery which could be caused by an injury to the neck or to the arteries in the neck. On direct examination, Dr. Massey stated that it seemed likely that the injury, as reported by the family, could have caused the stroke that resulted in the plaintiff's death. However, on cross examination, Dr. Massey admitted that this statement was based upon the history that he received from the family and their description of the alleged work-related event. He admitted that had the plaintiff not suffered a severe neck injury, his stroke could have occurred spontaneously. He stated that his conclusions were based upon the family history of a "severe neck injury".

7. Dr. Darren Davis is a pathologist who performed the autopsy on Mr. Maggard. At the time he performed the autopsy, Dr. Davis had no history of a work-related injury. Dr. Davis concluded that, based upon his autopsy findings, Mr. Maggard's cause of death was bilateral vertebral arterial mural injury. More simply put, he stated that plaintiff had damage to his blood vessel and to the wall of the vessel. Once the vessel had been damaged, that created an area that was disposed to form clots. A blood clot formed and grew into the basilar artery interfering with the blood circulation and that subsequently caused Mr. Maggard's death. When presented with a hypothetical question that plaintiff sustained a hard jolt at work resulting in an abrupt change of level while operating a bull dozer, Dr. Davis opined that this incident

"could be the cause of the trauma."

8. Dr. Joseph Zerga, a neurologist, reviewed the medical records of the UK Medical Center. Dr. Zerga was of the opinion that if a trauma could be substantiated through the evidence, there would be sufficient relationship to suggest that the trauma plays a role in Mr. Maggard's death.

9. The facts of this case present a very close question on the issue of causation. The burden of proof, of course, rests upon the plaintiff to show that the work-related injury occurred and that the injury resulted in a harmful change resulting in the plaintiff's death. Grissom v. Walters, Ky. 419 SW2d 1949 (1967). Marcum v. General Electric Company, Ky. 479 SW2d 640 (1972). After a careful review of all of the testimony presented, this Administrative Law Judge must conclude that the plaintiff has failed to sustain this burden of proof. The plaintiff never actually described the alleged "hard jar", nor was there any testimony as to the precise time that this incident allegedly occurred. Plaintiff was never able to state whether this incident occurred prior to or after the onset of his symptoms. It is further interesting to note that the first documentation that the plaintiff sustained a work-related injury was a notation placed in the plaintiff's medical chart by his own daughter. The medical testimony establishes only that the alleged work-related incident "could have" or "may have" resulted in plaintiff's death, but to a large degree, this conclusion must be based upon the history of the work-related event which was provided by Mr. Massey's family. As pointed out by the Defendant-Employer, there appeared to be some inconsistencies in the description of the alleged work-related event as provided by the family. Dr. Massey received a history of "several extreme jolts" whereas, Dr. DeLeon received a history of a jarring incident whereby plaintiff's bull dozer changed levels. It must also be noted that the plaintiff had several other significant risk factors which

could also have resulted in the onset of symptoms and his ultimate death. Under the facts as presented in this case, this Administrative Law Judge concludes that these other risk factors are equally credible causes for the onset of plaintiff's complaints. Both Dr. Massey and Dr. Davis clearly stated that plaintiff's could have occurred in the absence of a traumatic event. The totality of the evidence in this case is simply insufficient to persuade this Administrative Law Judge that the plaintiff suffered a work-related injury which resulted in the stroke and his ultimate death.

It is within the discretion of the Administrative Law Judge as Finder of Fact to judge the weight, credibility and substance and the inferences to be drawn from evidence in order to determine whether the burden of proof has been met. Paramount Foods, Inc. v. Burkhardt, Ky. 695 SW2d 418 (1985). Although the evidence may be sufficient to raise a suspicion that the plaintiff suffered a work injury resulting in his death that is simply insufficient to support a finding of causation and an award benefits.

RULINGS OF LAW

KRS 342.0011, KRS 342.020, KRS 342.1202, KRS 342.730 CASES AS CITED.

ORDER

It is hereby **ORDERED AND ADJUDGED** by the Administrative Law Judge that the claim of Audrey Maggard for benefits based upon the death of her husband, Ben Maggard, is hereby **DISMISSED**.

This 9th day of July, 1992.

/s/ Thomas A. Nanney
THOMAS A NANNEY
ADMINISTRATIVE LAW JUDGE

Supreme Court of Kentucky

95-SC-289-WC

BEN MAGGARD, Deceased; And
AUDREY MAGGARD, Widow and
Next Friend of Andrew Maggard,
A Minor — APPELLANTS

V. APPEAL FROM COURT OF APPEALS
NO. 93-CA-966-WC
(Workers' Compensation Board No. 91-42303)

LESLIE RESOURCES, INC.;
SPECIAL FUND; THOMAS A NANNEY,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD — APPELLEES

ORDER

Appellant's motion for leave to file a petition for rehearing in the above-styled action is denied.

Lambert, Fuqua, Reynolds, and Stumbo, JJ., sitting.
All concur.
ENTERED: October 18, 1995

/s/ Robert F. Stephens
Chief Justice

Supreme Court of Kentucky

95-SC-289-WC

BEN MAGGARD, DECEASED, ET AL. APPELLANTS

ON REVIEW FROM COURT OF APPEALS
93-CA-966
WORKERS' COMPENSATION BOARD NO. WC-91-42303

LESLIE RESOURCES, INC., ET AL. APPELLEES

ORDER

Appellant's motion, treated as a belated motion for an enlargement of time in which to file a notice of appeal, is denied.

Stephens, C.J. and Lambert, Reynolds, and Spain, JJ., sitting. All concur.

ENTERED June 1, 1995.

/s/ Robert F. Stephens
Chief Justice

OFFICE OF
CLERK OF COURT OF APPEALS

SEAL
George E. Fowler, Jr.
Clerk

360 Democrat Drive
Frankfort, Kentucky 40601-9229
Telephone:
(502) 573-7920
FAX:
(502) 573-6795

March 21, 1995

Phyllis L. Robinson
P.O. Box 952
Hyden, Kentucky 41749

Re: Ben Maggard, etc., et al
vs.
Leslie Resources, Inc., et al
File NO. 93-CA-966-WC

Dear Ms. Robinson:

This office has this date received your check number 6862 in the amount of $125.00 and a notice of appeal, appealing the February 17, 1995 decision. The last day for filing was March 19, 1995. It appears you decided to utilize CR 76.40(2) to accomplish timely filing. However, the notice of appeal and check were mailed by "Certified" rather than "Registered" mail as required by that rule. Accordingly, we are herewith returning same to you.

Sincerely,

GEORGE E. FOWLER, JR., CLERK

By: /s/ Jeanette Mulley
Jeanette Mulley
Chief Deputy Clerk

Enclosures

cc: Randall Scott May
Thomas A. Nanney
Judith K. Bartholomew
Peter J. Naake
Walter W. Turner
Valerie L. Salven
File

CA-3

Ben Maggard

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UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202-3988

LEONARD GREEN
CLERK

TELEPHONE
(513) 684-2953
FTS 684-2953

March 17, 1995

Phyllis L. Robinson
Attorney at Law
P.O. Box 952
Hyden, Kentucky 41749

Re: Return of check #6505 for $125.00

Dear Ms. Robinson:

We are returning your check because it was sent to us by mistake.

Thank you for your assistance. If you have any further questions, please do not hesitate to contact our office.

Very truly yours,

Leonard Green, Clerk

Debra Cook
Deputy Clerk

LAW OFFICE
PHYLLIS L. ROBINSON
ATTORNEY AT LAW
P.O. Box 952
HYDEN, KENTUCKY 41749

OFFICE: (606) 672-2800 PHONE (606) 672-3037

March 16, 1995

United States Court of Appeals
Mr. Leonard Green, Clerk
538 Potter Stewart U.S. Courthouse
100 East 5th Street
Cincinnati, Ohio 45202

RE: BEN MAGGARD et al.
V. LESLIE RESOURCES, INC. et al.
No.P 93-CA-0966-WC

Dear Mr. Green:

On behalf of the plaintiff BEN MAGGARD, Deceased, and Audrey Maggard, Widow and Next Friend of Andrew Maggard, A.Minor

- ☐ Petition/Complaint/Summons
- ☐ Entry fee of $ _____
- ☐ Confirmation of filing card to be returned to this office
- ☐ Our appearance/withdrawal for _____
- ☐ Defendant's answer with counterclaim

☐ Interrogatories of plaintiff/defendant to be answered by defendant/plaintiff
☐ Request for production of documents/to admit fact
☐ Military affidavit
☐ Plaintiff's/defendant's request for default/judgment
☐ Stipulation as to/agreement for _____
☐ Return of summons/subpoena having been accepted/ served upon the plainitff/defendant
☐ Motion/affidavit/memorandum _____
☒ Other NOTICE OF APPEAL AND CHECK IN THE AMOUNT OF $125.00
☐ Please place this matter on the docket/jury/trial/motion /conference list for the following date _____ or at the earliest date at _____ am/pm.
☐ Please return file stamped copy of filed documents.
☐ A stamped, self-addressed envelope is enclosed.

Very truly yours,

/s/ Phyllis L. Robinson
(TBH)
Phyllis L. Robinson

SUPREME COURT OF KENTUCKY
CASE NO.: 95-SC-289-WC

BEN MAGGARD, DECEASED BY AUDREY MAGGARD, WIDOW AND NEXT FRIEND OF ANDREW MAGGARD, A MINOR — APPELLANT

VS:

WORKERS COMPENSATION BOARD, HON. THOMAS A. NANNEY, ALJ, LESLIE RESOURCES, INC. AND SPECIAL FUND — APPELLEES

MOTION FOR RECONSIDERATION
OF JUNE 1, 1995 ORDER

Appellant tendered a Notice of Appeal that would have been timely if mailed "Registered" rather than "certified." The Deputy Clerk would not file the Notice for that reason. The Supreme Court has denied the motion to file same by Order of June 1, 1995.

Appellant, Ben Maggard, et al., moves the Court to reconsider the Order dated June 1, 1995. This is a harsh result for which the widow may have no adequate remedy.

Audrey Maggard has shown that she filed the notice of appeal to the Supreme Court within the time specified for filing, as it was delivered to be mailed by certified mail with the date the transmitting agency received said document from the sender noted

by the transmitting agency on the outside of the container used for transmitting within the time allowed for filing. Kentucky Practice, by Judge Bertlesman and Kurt A. Phillips, in the notes in regard to CR76.40, provides that a pleading is deemed timely filed if it is delivered to a recognized mail carrier or sent by certified or registered mail. (emphasis ours)

The Supreme Court, in denying the motion to file the notice of appeal, is requiring strict compliance with an aspect of the notice of appeal that is not truly jurisdictional. The Kentucky Supreme Court had previously overruled the line of cases requiring strict compliance with the notice of appeal. The Court adopted a policy of substantial compliance as set out in CR 73.02(2), and Ready v. Jamison, 705 S.W.2d 479 Ky., 1986.

In this particular case, the appellant, Ben Maggard and Audrey Maggard, his widow, substantially complied with the requirements of the notice of appeal by transmitting the document by certified mail within the time allowed for filing. There is no real difference between "registered" and "certified" mail in that both require special handling and special fees. When a noted authority such as Judge Bertlesman uses the terms interchangeably, the rules of practice have set "a trap for the unwary." Ready, supra, Vance dissent, p.480.

No substantial harm has resulted to opponents; Defendant Leslie Resources, has not objected and the Special Fund objection was not filed because it was not timely.

The change in CR 73.02(1)(a) provides that failure to timely file shall require dismissal, but failure to comply with other rules does not affect validity. The requirement between "registered mail" or "certified mail" should not affect the validity of an otherwise timely appeal.

It would be far better to impose a fine on this counsel than to dismiss an appeal that is timely under the doctrine of substantial

compliance.

Counsel recognizes that the court has a compelling interest in maintaining an orderly appellate process, but the penalty for beach (sic) of a rule should have a reasonable relationship to the harm caused. The maximum fine would be a far better sanction that dismissal of an entire appeal.

Since this document was transmitted by United States certified mail, the notice of appeal should be considered timely filed under the doctrine of substantial compliance and the appeal should be permitted to go forward so that this case may be decided on the merits and so that Audrey Maggard is not denied her constitutional right to appeal.

WHEREFORE, Appellants pray that the Supreme Court reconsider the order of June 1, 1995, order that the notice of appeal is timely filed and for any other relief which is proper.

/s/ Phyllis L. Robinson
PHYLLIS L. ROBINSON
ATTORNEY AT LAW
P.O. BOX 952
HYDEN, KENTUCKY 41749

CERTIFICATE OF SERVICE:

This is to certify that the foregoing was mailed U.S. Postage Prepaid to the following on this the 7 day of June, 1995.

Hon. Thomas A. Nanney
Administrative Law Judge
P.O. Box 328
Fulton, Kentucky 42041

Hon. Randall May
Attorney at Law
P.O. Drawer 1017
Hazard, Kentucky 41749

Hon. Peter Nakke
Special Fund
620 South Third Street
Louisville, Kentucky 40202

Hon. Valerie Slaven
Workers Compensation Board
Perimeter Park West
1270 Louisville Road
Frankfort, Kentucky 40601

/s/ Phyllis L. Robinson
PHYLLIS L. ROBINSON

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO.: 93-CA-0966-WC

BEN MAGGARD, Deceased, and AUDREY MAGGARD, Widow and Next Friend of Andrew Maggard, A Minor — APPELLANTS

VS:

LESLIE RESOURCES, INC.; SPECIAL FUND; HON. THOMAS A. NANNEY, Administrative Law Judge; and WORKERS COMPENSATION BOARD — APPELLEES

MOTION FOR EXTENSION OF TIME
IN WHICH TO FILE NOTICE OF APPEAL AND/OR
MOTION TO ACCEPT NOTICE OF APPEAL

Comes the Appellant, Ben Maggard, by and through Audrey Maggard, widow and next friend of Andrew Maggard, a minor, and moves the Court for an enlargement of time in which to file the attached notice of appeal and as grounds therefore, CR 7.02 provides for an enlargement of time where the failure to act was the result of excusable neglect and is not limited by other rules. In the alternative, Appellant prays that the notice of appeal be accepted as timely filed.

The particular appeal is sought pursuant to CR 76.25, which provides for review of Workers Compensation Board decisions. This rule provides that, after the Court of Appeals has issued a

decision: "Procedure For Further Review. Further review may be sought in the Supreme Court of a final decision or final order of the Court of Appeals in a Workers Compensation matter, and shall be prosecuted in accordance with the rules generally applicable to other appeals."

This is ambiguous and this Counsel incorrectly interpreted that to mean the proper procedure was a motion for discretionary review and filed same with the clerk of the Supreme Court who advised her that same should be prosecuted by filing a notice of appeal.

The notice of appeal was prepared and mailed on March 16, 1995. Unfortunately, same was mailed to the United States Court of Appeals for the Eastern District of Kentucky in Cincinnati, Ohio on March 16, 1995. The secretary who typed the appeal, had the caption correct, but apparently misunderstood and wrote a check, Exhibit "1", [*attached to original; not attached herein*] to the U.S. Court of Appeals and then sent the notice and check to the U.S. Court of Appeals as shown by the check which is marked, "For credit to the United States Treasurer." The U.S. Court of Appeals sent the original and the check back and Counsel did not receive same until March 18, 1995.

All copies had been properly certified mailed on March 16, 1995. Counsel did not realize until March 18, 1995 that the original had been mailed to the wrong place, Counsel had an original notice of appeal prepared and same was delivered to the Sizerock Post Office on March 18, 1995 as shown by the receipt for certified mail. The Hyden Post Office closes at 11:00 a.m. on Saturday.

That pursuant to CR 6.01, this was timely mailed as "the last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event, the period runs until the end of the next day, which is not a Saturday, a Sunday, or

a legal holiday. Thus, Counsel would actually have had until Monday, March 20, 1995 in which to mail this document, but in an attempt to have service made earlier, mailed same on March 18, 1995 by certified mail.

Rule 76.40 provides that to be timely filed, a document must be filed with the clerk of the Court of Appeals within the time specified for filing except shall be deemed timely filed if transmitted by United States registered or express mail or by any other recognized mail carriers with date the transmitting agency received said document from the sender noted by the transmitting agency on the outside the container.

Counsel's envelope was not returned to her, but she does have the receipt for certified mail which shows that it was received by the post office on March 18, 1995, copy attached as Exhibit "2" [*attached to original; not attached herein*]. The author's comment at page 223 of Kentucky Practice, provides that if a pleading required to be timely filed, is delivered to a recognized mail carrier or sent by certified or registered mail, it is deemed timely filed if the transmitting carrier received the pleading within the time allowed for filing and the date the receipt is noted on document. (Attached as Exhibit "3") [*attached to original; not attached herein*]. In this particular case, this was timely received by the post office on March 18, 1995 and the date of filing was not on the document. Clearly, the rule was changed, not to become a technical trap for the unwary, but to allow use of United Parcel Service and Federal Express carriers, thus there was substantial compliance.

Counsel has made every effort to timely file this notice of appeal and any failure should be attributed to excusable neglect.

Counsel misread CR 76.25 and filed a motion for discretionary review; an experienced and competent secretary, who usually handles complicated Social Security appeals, sent the

original notice to the U.S. Court of Appeals for the Sixth Circuit in Cincinnati, Ohio, but properly certified and mailed all copies therefore the Defendants have all been notified of the appeal.

In an effort to effect receipt by the Court of Appeals on Monday, March 20, 1995, Counsel mailed same by certified mail, the comment to the rules indicates that is proper.

Counsel argues that, in the interest of justice, it would be better to issue monetary sanctions against Counsel than deny a widow and her infant child their last appeal.

WHEREFORE, Counsel prays that the Court find that this Notice of Appeal was timely filed. In the alternative, Counsel prays for an extension of time to timely file same.

/s/ Phyllis L. Robinson
PHYLLIS L. ROBINSON
ATTORNEY AT LAW
P.O. BOX 952
HYDEN, KENTUCKY 41749

CERTIFICATE OF SERVICE:

This is to certifiy that the foregoing was mailed U.S. Postage Prepaid to the following on this the 23 day of March, 1995.

Hon. Thomas A. Nanney
Administrative Law Judge
P.O. Box 328
Fulton, Kentucky 42041

Hon. Randall Scott May
Attorney at Law
P.O. Drawer 1017
Hazard, Kentucky 41701

Hon. Peter J. Nakke
Special Fund
620 South Third Street
Louisville, Kentucky 40202

Hon. Valerie Slaven
Workers Compensation Board
Perimeter Park West, Building C
1270 Louisville Road
Frankfort, Kentucky 40601

/s/ Phyllis L. Robinson
PHYLLIS L. ROBINSON